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Crime of Dispassion: Eighth Circuit (Mis)Applies DeShaney in Failing to Hold State Employees Accountable to the Children They Protect

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Notes

Crime of Dispassion: Eighth Circuit (Mis)Applies *DeShaney* in Failing to Hold State Employees Accountable to the Children They Protect

*S.S. ex rel. Jervis v. McMullen*¹

I. INTRODUCTION

The fact that children in the United States are far more likely to suffer acts of violence in their homes than outside of them is a continuing national crisis and shame.² The statistics can be mind-numbing,³ but, often, the facts surrounding a single case have an opposite, shocking effect on the observer. Particularly because child abuse cases are so emotionally charged, the dispassionate manner in which courts typically address legal claims arising from the abuse can exacerbate the already inflamed passions of the uninitiated—and, sometimes, even the long-time—observer. More often than not, a court's reluctance to allow the particular facts of a case to color its legal analysis is necessary and laudable. Occasionally, however, the outrage in response to such deliberation is justified.

Beyond the obvious maxim that perpetrators of violence against children should be punished, the question arises whether state agencies, or their employees, holding themselves out as the protectors of children, should be held legally accountable to the children they protect when they make reckless decisions that endanger a child's welfare. In *S.S. ex rel. Jervis v. McMullen*,⁴ the United States Court of Appeals for the Eighth Circuit addressed this question directly and, in the process, perpetuated, and perhaps expanded, a long line of Supreme Court

1. 225 F.3d 960 (8th Cir. 2000) (en banc), *cert. denied*, 121 S. Ct. 1227 (2001).

2. See Tania Schriwer, Comment, *Establishing an Affirmative Governmental Duty to Protect Children's Rights: The European Court of Human Rights as a Model for the United States Supreme Court*, 34 U.S.F. L. REV. 379, 380 (2000) (citing *U.S. Children Safer on the Streets than at Home, Says Prevent Child Abuse America*, P.R. NEWswire, Mar. 30, 1999, available at LEXIS News Library, Wire Service Stories File).

3. See Schriwer, *supra* note 2, at 379. During the 1990s, the State of Missouri reported 239 child deaths related to abuse or neglect. NANCY PEDDLE & CHING-TUNG WANG, CURRENT TRENDS IN CHILD ABUSE PREVENTION, REPORTING AND FATALITIES 16-17 (Nat'l Ctr. on Child Abuse Prevention Research, Working Paper No. 808, 2001), available at <http://www.preventchildabuse.org>. Nationwide, there were 6,322 fatalities related to abuse. *Id.*

4. 225 F.3d 960 (8th Cir. 2000) (en banc), *cert. denied*, 121 S. Ct. 1227 (2001).

precedent rendering it virtually impossible for a child to succeed in claiming a substantive due process violation at the hands of the state.

This Note reviews the legal landscape of Fourteenth Amendment substantive due process theory promulgated by the Supreme Court and discusses the importance of the landmark decision in *DeShaney v. Winnebago County Department of Social Services*⁵ in that context. Next, this Note discusses the treatment of *DeShaney* by the circuit courts, focusing on two exceptions to *DeShaney*'s analysis that have been carved out by many courts. This Note then reviews the decision in *McMullen*, and argues that the court of appeals improperly applied *DeShaney* to the facts in *McMullen* and that, in any event, *DeShaney* is an unfortunate extension of an unduly restrictive approach to Fourteenth Amendment claims. Finally, this Note suggests that the current stance of the federal courts on state actors' constitutional liability to children endangered by their actions warrants a voluntary state review of tort legislation so that children like S.S. are not left without options for redressing harm inflicted by their self-described protectors.

II. FACTS AND HOLDING

Shortly before her third birthday, in January of 1994, S.S. was taken into protective custody by the Missouri Division of Family Services ("DFS") on the basis of allegations of abuse at the hands of her parents.⁶ On April 5, 1994, the Circuit Court of Cass County placed S.S. in the permanent custody of DFS for placement in foster care.⁷ During the time that DFS had custody of S.S., Michelle McMullen, one of the social workers assigned to S.S.'s case by DFS, permitted supervised visits between S.S. and her father.⁸ Also present during these meetings was Joel Griffis, a friend of S.S.'s father and a convicted child molester.⁹ Although no one with DFS was aware of Griffis's molestation record at the time of these visits, it later became apparent to the DFS employees handling S.S.'s case that Griffis posed a significant danger to S.S.¹⁰

5. 489 U.S. 189 (1989).

6. *McMullen*, 225 F.3d at 964. S.S. was allegedly locked in her room for extended periods of time by both of her parents and sexually abused by an unknown person. *Id.* S.S.'s father also allegedly smeared human feces on S.S.'s face. *Id.* at 964-65.

7. *Id.* at 965.

8. *Id.* In addition to McMullen, Division of Family Services ("DFS") employees handling S.S.'s case included social worker Sherry Jacoby and Kathleen Barnett, who supervised both Jacoby and McMullen. *Id.*; see *infra* note 17 and accompanying text.

9. *McMullen*, 225 F.3d at 965.

10. *Id.* DFS's awareness of this danger is well documented. McMullen received an anonymous phone call in September of 1995 alerting her to Griffis's conviction record and to the fact that he was spending time with S.S. and her father. *Id.* She also was

Nevertheless, beginning on March 8, 1996, S.S. was permitted to live with her father on an "extended visit" basis.¹¹ She remained in her father's home on this basis until McMullen petitioned the court to release S.S. from the custody of DFS and return her to her father's permanent custody, a request the court granted on August 22, 1996.¹² In February of 1997, a caller to a Jackson County child abuse hotline stated that Griffis had sexually molested S.S. twice in November of 1996 and January of 1997.¹³ Griffis was charged with two counts of first-degree statutory sodomy, and S.S.'s father was charged with four counts of felony child endangerment.¹⁴ S.S. was hospitalized for a week for treatment of her injuries, and she was hospitalized in a Kansas City psychiatric facility at the time the subsequent complaint on her behalf was filed.¹⁵

S.S. brought an action, through her guardian ad litem, in the United States District Court for the Western District of Missouri claiming violation of her procedural and substantive due process rights under the Fourteenth Amendment and seeking damages under 42 U.S.C. § 1983.¹⁶ McMullen, as well as Sherry

informed through multiple sources that Griffis had been allowed to have contact with S.S. on at least nine occasions during the time DFS had custody of S.S. *Id.* A psychologist warned DFS, on the basis of his evaluation of S.S.'s father, that the father seemed "dangerously sympathetic with a known child sexual offender, which would appear to be a very risky behavior" and that "plans toward reunification should proceed cautiously." *Id.* McMullen also became aware, through a child abuse hotline call, of vaginal rashes suffered by S.S. and that a convicted child molester S.S. referred to as "grandpa" frequented the home of her father. *Id.* Although McMullen inspected S.S. at her day care facility, she did not arrange to have S.S. examined by a physician. *Id.* McMullen also received a phone call from Griffis during which Griffis complained that DFS was unfairly limiting his contact with S.S. *Id.*

Jacoby received a call from S.S.'s foster mother in June of 1995 wherein Jacoby was informed that "S. told [the foster mother] over and over that she humps with her daddy, Jon." *Id.* Jacoby also knew of at least three other instances of inappropriate sexual behavior exhibited by S.S. and, like McMullen, received phone calls alerting her to the fact that Griffis was spending time with S.S. *Id.* Finally, Jacoby became aware in December of 1995 that S.S. suffered from a yeast infection and was "hurting in her vaginal area." *Id.*

11. *Id.*

12. *Id.* McMullen's own records indicate that on the date of S.S.'s return to her father's permanent custody, she and her supervisor, Barnett, decided "that if something happens to S.S. because [the father] knows what Joell [sic] has done in the past that he will be solely responsible." *Id.* at 965-66.

13. *Id.* at 966. Griffis was living with S.S. and her father at the time of these incidents. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 962.

Jacoby and Kathleen Barnett, were named as defendants in the suit.¹⁷ In her complaint, S.S. alleged that the defendants violated her constitutional rights in releasing her to her father's permanent custody despite having notice that her father was allowing contact between S.S. and, Griffis, a known pedophile.¹⁸ The complaint alleged that such action by the defendants displayed "deliberate and conscious indifference to [S.S.'s] safety and well-being and violate[d] S.S.'s constitutional right to be reasonably safe from harm."¹⁹ The district court granted the defendants' request for dismissal, relying upon the Supreme Court's decision in *DeShaney*.²⁰ "The court held that S.S. lacked any substantive due process right to be protected from Griffis," a private citizen, by the defendants as state employees.²¹

On appeal, a three-judge panel of the United States Court of Appeals for the Eighth Circuit reversed the dismissal of S.S.'s complaint.²² The panel rejected the position of the defendants and the district court that *DeShaney* mandated a dismissal of S.S.'s claim, holding that such "reliance is misplaced because it obscures the affirmative nature of the defendants' misconduct."²³ The panel held that while *DeShaney* and its progeny stand for the proposition that state actors have no general affirmative duty to protect private citizens from each other, S.S.'s complaint was distinguishable because the defendants took affirmative action to place S.S. in a position of danger rather than merely failing to act on her behalf.²⁴ To the extent S.S.'s complaint alleged such "state-created danger," the panel held it successfully "thread[ed] an elusive needle" allowed for by circuit precedent and that it stated a "viable claim," notwithstanding *DeShaney*.²⁵

On rehearing *en banc*, the court of appeals rejected the decision of its three-judge panel and affirmed the district court's dismissal of S.S.'s complaint.²⁶ While the court acknowledged that "if the state acts affirmatively to place someone in a position of danger that he or she would not otherwise have faced, the state actor, depending on his or her state of mind, may have committed a

17. *Id.* at 965. Although Cynthia M. Montgomery, Ph.D., was named as a defendant in the original action, she was not a party in the instant appeal.

18. *Id.*

19. *Id.* at 969.

20. S.S. *ex rel.* Jervis v. McMullen, 186 F.3d 1066, 1068-69 (8th Cir. 1999), *rev'd*, 225 F.3d 960 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1227 (2001).

21. *Id.* at 1069. The district court also dismissed S.S.'s procedural due process claim, which S.S. did not appeal. *Id.* at 1069 n.2.

22. *Id.* at 1069.

23. *Id.*

24. *Id.* at 1069-70.

25. *Id.* at 1072.

26. S.S. *ex rel.* Jervis v. McMullen, 225 F.3d 960, 962 (8th Cir. 2000) (*en banc*), *cert. denied*, 121 S. Ct. 1227 (2001).

constitutional tort,”²⁷ the court held that no such liability arose in this case “for the simple reason that in returning S.S. to her father, the state did not increase the danger of significant harm to S.S.”²⁸ Rather, the court held that the state “merely” returned S.S. to the same situation from which she originally had been extracted.²⁹ Additionally, the court held that even if it is assumed, *arguendo*, that the state acted affirmatively to place S.S. in a new position of danger, the conduct of the defendants in this case did not reach the level of egregiousness required by the Supreme Court to trigger the protections afforded by 42 U.S.C. § 1983.³⁰ Specifically, the conduct of the defendants vis á vis S.S., while sufficient to show ordinary negligence, did not “shock the conscience” of the court, in that it did not evince the type of “deliberate indifference,” “abuse of power,” or failure to “comport with traditional ideas of fair play and decency” required to shock the court’s conscience.³¹ When a state removes a child from parental custody on the grounds of abuse, and later negligently returns the child to the same environment with notice of an identical level of danger of significant harm to the child, such state action does not violate the child’s substantive due process rights under the Fourteenth Amendment or 42 U.S.C. § 1983.³²

III. LEGAL BACKGROUND

A. “Affirmative Duties” Under 42 U.S.C. § 1983 and the Fourteenth Amendment

The last few decades have seen the emergence of 42 U.S.C. § 1983³³ as “the primary vehicle for litigation requiring state officials to obey the commands of federal constitutional or statutory law.”³⁴ Based on the Supreme Court’s treatment

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 963.

31. *Id.* at 964 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1988)).

32. *Id.* at 962.

33. This Section provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

34. WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 1149 (10th ed. 1997).

of this provision, however, the private citizen seeking to vindicate her Fourteenth Amendment substantive due process rights through the gate of § 1983 will find it a narrow passage indeed.

Time and again, the Court has reiterated its steadfast refusal to allow § 1983 to turn the Fourteenth Amendment into a “font of tort law to be superimposed upon whatever systems may already be administered by the States.”³⁵ The Court consistently has interpreted the Constitution strictly in this regard, holding that the Constitution “does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.”³⁶ That this remains today the conscious and deliberate approach to adjudicating substantive due process claims against state actors is clear, given the language of a recent Court opinion.³⁷

Equally apparent is the interpretive bedrock upon which the Court’s rigorous scrutiny of § 1983 claims is built. Judge Richard Posner’s oft-quoted description of the Bill of Rights as a “charter of negative liberties”³⁸ drives much of the Court’s approach to the Constitution in general, and the Fourteenth Amendment specifically. This view of the Constitution, which dates at least to the Court’s narrow approach to the Fourteenth Amendment adopted in the *Slaughter-House*

35. *Paul v. Davis*, 424 U.S. 693, 701 (1976).

36. *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

37. *See County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1988) (“[W]e have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.”).

38. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The dictum from which this phrase is taken is worthy of lengthier quotation:

There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. But there is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order. Discrimination in providing protection against private violence could of course violate the equal protection clause of the Fourteenth Amendment. But that is not alleged here. All that is alleged is a failure to protect Miss Bowers and others like her from a dangerous madman, and as the State of Illinois has no federal constitutional duty to provide such protection its failure to do so is not actionable under [§] 1983.

Id. (citations omitted).

Cases,³⁹ has resulted in the Court's recognition of only "negative rights, which require the government to refrain from certain conduct, as opposed to positive rights, which impose affirmative duties on the government to take actions or expand resources to meet the needs of certain citizens."⁴⁰ This reading of the Constitution has led the Court to refuse to impose upon the states a Fourteenth Amendment duty to fund abortion services for poor women,⁴¹ protect citizens from acts of violence perpetrated by other private citizens,⁴² or protect state government workers from hazardous work conditions.⁴³ In sum, the Court has promulgated a formidable body of law that establishes its firm commitment to the idea that "there may be Constitutional sins of commission, but not of omission."⁴⁴ This doctrine is no less apparent in the Court's stance regarding the existence of a state's obligation to protect children.

B. DeShaney v. Winnebago County Department of Social Services

The quintessential decision enunciating the Supreme Court's stance on a state's obligation to protect children from private abuse is *DeShaney*. The facts that gave rise to that decision are chilling. The Winnebago County Department

39. See *Slaughter-House Cases*, 83 U.S. (1 Wall.) 36, 78 (1872) (narrowly construing the reach of the Privileges and Immunities Clause of the Fourteenth Amendment); see also Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 410 (1990).

40. Gerhardt, *supra* note 39, at 410.

41. See *Harris v. McRae*, 448 U.S. 297, 316-17 (1980).

42. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

43. See *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992). In addition to the "negative liberties" rationale for narrowly construing a state's obligation to protect its citizens, the doctrine of Eleventh Amendment sovereign immunity has been invoked frequently in several recent and sharply divided Court decisions. See, e.g., *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 960 (2001) (5-4 decision) (holding that Eleventh Amendment sovereign immunity applied to suits against a state under the Americans with Disabilities Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 67 (2000) (5-4 decision) (holding that Congress exceeded its authority in purporting to authorize citizen suits against a non-consenting state under the Age Discrimination in Employment Act); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (holding that Congress exceeded its authority in purporting to abrogate Florida's immunity from being sued by an Indian tribe via the Indian Commerce Clause); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (holding that the Eleventh Amendment barred a suit by a citizen of Louisiana seeking to compel payment due on a state-issued bond).

44. William Wayne Justice, *Thurgood Marshall Medal of Justice Award: Remarks*, GEO. J. ON POVERTY L. & POL'Y 413, 413 (2000).

of Social Services ("DSS") received word in 1982 that a four-year-old boy, Joshua DeShaney, suffered beatings at the hands of his father.⁴⁵ When Joshua received treatment in early 1983 for multiple bruises and abrasions, the state took temporary custody of him, but DSS released him three days later for lack of sufficient evidence of abuse.⁴⁶ Despite the implementation of measures designed to protect Joshua,⁴⁷ emergency personnel reported to DSS one month later that Joshua again had been treated for suspicious injuries.⁴⁸ Subsequent visits by DSS caseworkers revealed non-compliance with the terms agreed to earlier by Joshua's father, and, in late 1983, DSS again received a report that Joshua had been given emergency treatment.⁴⁹ No remedial action was taken by DSS in response to any of these first-hand observations or third-party reports.⁵⁰

In March of 1984, Joshua's father beat him so badly that Joshua suffered "brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded."⁵¹ When told of the attack on Joshua, the caseworker assigned to his case expressed a lack of surprise.⁵² Joshua and his mother brought an action under § 1983 against Winnebago County, DSS, and certain DSS employees, claiming Joshua's Fourteenth Amendment substantive due process rights were violated by the state in its refusal to intervene in a situation that the state knew to be dangerous to Joshua.⁵³

In its ruling, the Supreme Court held that no constitutional right is infringed when a state fails to protect a child from harm inflicted by a private citizen.⁵⁴ Drawing upon its firmly entrenched "negative liberties" approach to the Fourteenth Amendment,⁵⁵ the Court concluded that the Constitution afforded Joshua "no affirmative right to government aid, even when such aid may be necessary to secure life."⁵⁶ Although the Court agreed with Joshua that the Fourteenth Amendment's Due Process Clause protects citizens from state-initiated

45. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 192 (1989).

46. *Id.*

47. *Id.* Joshua's father agreed to comply with voluntary measures, including counseling, encouraging his girlfriend to move out of the home, and entering Joshua in a preschool program. *Id.*

48. *Id.*

49. *Id.* at 192-93.

50. *Id.* at 193.

51. *Id.*

52. *Id.* "I just knew the phone would ring some day and Joshua would be dead." *Id.* at 209.

53. *Id.* at 193.

54. *Id.* at 201.

55. *See supra* notes 38-44 and accompanying text.

56. *DeShaney*, 489 U.S. at 196.

deprivation of life, liberty, or property without due process of law, it declined Joshua's invitation to read the Fourteenth Amendment to "impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."⁵⁷ The only circumstance the Court conceded may give rise to a state's affirmative duty to protect a citizen from private harm arises when the state has created a "special relationship" with an individual by depriving him or her of the ability to protect himself or herself from harm, and harm comes to the individual while he or she is in state custody.⁵⁸

In a vigorous dissent, Justice Brennan argued that in choosing to maintain a system for addressing child welfare issues, a choice that the state admittedly is under no constitutional obligation to make, the state acted affirmatively to an extent that opened the door to liability under the Constitution for failing to operate that system in a manner that brings no harm to children such as Joshua.⁵⁹ Through its "monopolization of a particular path of relief,"⁶⁰ effectively cutting Joshua off from private-sector sources of relief, such as churches, other social service agencies, schools, police, or hospitals, the state, according to Brennan, took upon itself a positive duty to intervene on his behalf and, at the same time, could not claim immunity from constitutional liability.⁶¹

57. *Id.* at 195.

58. *Id.* at 199-201; *see* *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982) (holding that a mentally retarded individual who was involuntarily committed to a state institution had a constitutionally-protected right to safe conditions of confinement); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that a prisoner whose medical needs were ignored by prison officials had a cause of action under § 1983).

59. *DeShaney*, 489 U.S. at 204-05 (Brennan, J., dissenting).

60. *Id.* at 207 (Brennan, J., dissenting).

61. *Id.* at 210 (Brennan, J., dissenting).

In a separate and frequently-quoted dissent of his own,⁶² Justice Blackmun questioned the majority's contention that the Court was bound by its past interpretive approach to the Fourteenth Amendment.⁶³ Blackmun maintained that the question whether to interpret due process provisions broadly or narrowly was not a necessarily settled one, and that the facts of Joshua's case should compel a "sympathetic reading, . . . which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."⁶⁴

C. Circuits' Application of *DeShaney*

The strict due process analysis in *DeShaney* has cast a long shadow over the lower federal courts' consideration of the states' obligation to protect abused children.⁶⁵ Nevertheless, two narrow exceptions to *DeShaney*'s "no affirmative duty" rule recognized by some lower federal courts—the "state-created danger" exception and the "special relationship" exception—together provide a loophole

62. The first sentence of the following excerpt from Blackmun's passionate dissent, which acknowledges directly the poignant nature of the facts of the case, has been quoted often:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, . . . "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about "liberty and justice for all"—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that [§ 1983] is meant to provide.

Id. at 213 (Blackmun, J., dissenting).

63. *Id.* at 212-13 (Blackmun, J., dissenting).

64. *Id.* at 213 (Blackmun, J., dissenting).

65. "Most courts now apply a strict *DeShaney* analysis, denying all substantive due process claims where the child is in physical custody of his parent even when the state has retained legal custody." Michele Miller, Note, *Revisiting Poor Joshua: State-Created Danger Theory in the Foster Care Context*, HASTINGS WOMEN'S L.J. 243, 251 (2000); see also *Bank of Ill. v. Over*, 65 F.3d 76, 77 (7th Cir. 1995) (holding that the presence of a court order barring contact between a child and her subsequent abuser did not distinguish the case from the facts present in *DeShaney*); *Blalock v. Tellus*, 22 F. Supp. 2d 1217, 1221 (D. Kan. 1998) (holding that a state's legal custody of a child without physical custody falls short of creating a special relationship exception to *DeShaney*).

by which some courts dissatisfied with a strict *DeShaney* analysis have afforded “cover” for children asserting substantive due process claims against a state.

In those jurisdictions that recognize it, the “state-created danger” exception can arise when, for example, “a child, though in legal custody of the state, resides with a natural parent and suffers injury due to abuse.”⁶⁶ The development of this exception was a response to the *DeShaney* Court’s assertion that the state “played no part in [the] creation [of dangers faced by Joshua], nor did it do anything to render him more vulnerable to them.”⁶⁷ Seizing upon the inverse implication of this language, some courts have “conclude[d] that if the state acts affirmatively to place someone in a position of danger that he or she would not otherwise have faced, the state actor, depending on his or her state of mind, may have committed a constitutional tort.”⁶⁸ Circuits that have adopted the “state-created danger” exception in this context include the Fifth,⁶⁹ Seventh,⁷⁰ Eighth,⁷¹ Ninth,⁷² Tenth,⁷³ and Eleventh⁷⁴ Circuits. The Third Circuit specifically has reserved judgment concerning adoption of this exception.⁷⁵

The “special relationship” exception to the rule announced in *DeShaney* was acknowledged specifically by the *DeShaney* Court.⁷⁶ The Court held that the rulings of *Estelle v. Gamble*⁷⁷ and *Youngberg v. Romeo*⁷⁸ together “stand . . . for

66. Miller, *supra* note 65, at 251; see *Courier v. Doran*, 23 F. Supp. 2d 1277, 1280 (D.N.M. 1998); *Tazioly v. City of Philadelphia*, No. CIV.A. 97-CV-1219, 1998 WL 633747, at *9-10 (E.D. Pa. Sept. 10, 1998).

67. *DeShaney*, 489 U.S. at 201.

68. S.S. *ex rel.* Jervis v. McMullen, 225 F.3d 960, 962 (8th Cir. 2000) (en banc), *cert. denied*, 121 S. Ct. 1227 (2001).

69. See *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 200 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995).

70. See *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990).

71. See *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993).

72. See *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989).

73. See *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995).

74. See *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 352-53 (11th Cir. 1989), *cert. denied*, *Spears v. Cornelius*, 494 U.S. 1066 (1990).

75. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir. 1995), *cert. denied*, 516 U.S. 858 (1995).

76. See *supra* note 58 and accompanying text.

77. 429 U.S. 97, 104 (1976) (holding that state prisoners may have a cause of action against state actors for failure to deliver appropriate medical care).

78. 457 U.S. 307, 317 (1982) (holding that an involuntarily committed patient has constitutionally protected liberty interests under the Fourteenth Amendment to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and adequate training).

the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.⁷⁹ While the Court viewed Joshua DeShaney's situation as outside the realm of the *Estelle-Youngberg* exception, subsequent lower court decisions have expressed a willingness to stretch the exception to apply to various other settings.⁸⁰

The foregoing discussion suggests a willingness on the part of some courts to mitigate the perceived harshness of *DeShaney* while largely adhering to its "negative liberties" philosophy. Largely unanswered, however, has been the question whether courts will consider the plight of children returned by the state to dangerous parents' custody to be within the realm of the exceptions to *DeShaney* espoused by some lower courts.

IV. INSTANT DECISION

A. The Majority

In *McMullen*, the United States Court of Appeals for the Eighth Circuit applied *DeShaney* to the § 1983 claim of a girl who alleged that employees of DFS violated her substantive due process rights by returning her to the parental home from which DFS had taken her more than two years earlier.⁸¹ The girl alleged that by returning her to her father despite notice that she would be in contact with a known pedophile, who, in fact, subsequently sodomized her on at

79. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989).

80. See *Kitzman-Kelly v. Warner*, 203 F.3d 454, 458 (7th Cir. 2000) (ward of the State of Illinois alleged sexual abuse by state's intern); *Norfleet ex rel. Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (asthmatic child died while in custody of foster parent); *Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) (child abused by employee of privately operated crisis shelter group home while in legal and physical custody of state); *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir. 1988), *cert. denied*, 489 U.S. 1021 (1989) (special relationship exception may apply when the state releases a prisoner to the closest bus stop and a bus stop employee is killed by the prisoner); *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983) (state may be liable under § 1983 for failing to protect inmates who are in known danger of harm by themselves or other inmates); *Ford v. Johnson*, 899 F. Supp. 227, 231 (W.D. Pa. 1995) (state-created danger theory may apply when a child is beaten to death by his father after the state relinquishes custody to the father).

81. *S.S. ex rel. Jervis v. McMullen*, 225 F.3d 960, 962-63 (8th Cir. 2000) (en banc), *cert. denied*, 121 S. Ct. 1227 (2001). Judge Morris Arnold wrote for a seven-to-three majority, with Judge Gibson writing in dissent.

least two occasions, DFS acted unconstitutionally and was liable for damages under § 1983.⁸²

The court's analysis began with an acknowledgment that, as the "*locus classicus*" for determining the merit of claims like S.S.'s, *DeShaney* was the appropriate springboard for the court's opinion.⁸³ The court characterized the central holding of *DeShaney* as stating that the purpose of the Fourteenth Amendment was to protect the people from the state and not to require the state to protect private citizens from each other.⁸⁴ While the court acknowledged that it was one of several courts that had announced a "state-created danger" exception to *DeShaney*'s holding, the court held that S.S. could not benefit from the exception "for the simple reason that in returning S.S. to her father, the state did not increase the danger of significant harm to S.S. It merely placed her back into the situation from which it had originally retrieved her."⁸⁵ The court maintained that, in this regard, *DeShaney* "[spoke] specifically to" the factual setting before the court when it held that in returning Joshua DeShaney to his father, the State of Wisconsin placed him in no worse a position than if it had not acted at all.⁸⁵ This aspect of *DeShaney*, the court argued, had been emphasized by previous decisions in the Eighth Circuit.⁸⁷ The fact that two and one-half years elapsed between the time that DFS took S.S. into custody and the time that she was returned to her father's permanent custody did not impact the court's legal calculus.⁸⁸

The court acknowledged *K.H. ex rel. Murphy v. Morgan*⁸⁹ as an extra-circuit case involving facts "arguably similar" to the case *sub judice* and which reached a contrary result.⁹⁰ The court distinguished *Murphy*, however, because in that case the state took affirmative steps to place K.H. in a *new* position of danger when it placed her in an abusive foster home, rather than returning her to the parental home from which the state initially rescued her.⁹¹ While the court conceded that distinguishing between exposure of a child by the state to a new danger and returning a child to the same position of danger from which she was removed "may seem to some to be gratuitous," the court held that such a

82. *Id.* at 962.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* (citing *Wells v. Walker*, 852 F.2d 368, 368-70 (8th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989)).

88. *But see infra* note 117 and accompanying text.

89. 914 F.2d 846 (7th Cir. 1990).

90. *McMullen*, 225 F.3d at 963.

91. *Id.*; *see Murphy*, 914 F.2d at 848-49.

distinction is necessary and “one, moreover, that we think *DeShaney* requires us to draw.”⁹²

The court went on to address what it considered to be another insurmountable obstacle to S.S.’s claim—that even if the state had acted affirmatively to place S.S. in a new position of danger, the court did not find that DFS’s actions vis á vis S.S. rose to the level of egregiousness necessary to support S.S.’s due process claim.⁹³ The court held that because of the “level of risk that a reasonable person would have assumed S.S. might be exposed to”⁹⁴ and the fact that it was S.S.’s father seeking custody, S.S. had made a case for negligence only.⁹⁵ The state’s obligation to return a child to her parents if possible led the court to distinguish sharply between such a case and a case, like *Murphy*, where the child is placed in a foster home.⁹⁶ The court looked to a substantial Supreme Court literature regarding the level of egregiousness a state’s conduct must reach to support a § 1983 claim.⁹⁷ The court noted that the Supreme Court consistently has held that such claims must allege acts that “shock the conscience” of a reviewing court; acts of negligence, gross negligence, or even recklessness will not suffice.⁹⁸ Notwithstanding the court’s acknowledgment “that the acts that S.S. claims were perpetrated against her . . . were utterly indecent and egregious [and] . . . shock [our conscience],” the court, nonetheless, stated that the proper inquiry was not into the acts of S.S.’s father but into the acts of the State of Missouri that S.S. blamed for her injuries.⁹⁹ The Supreme Court’s stalwart insistence that the Fourteenth Amendment not become a “font of tort law to be superimposed upon whatever systems may be administered by the States” compelled the court of appeals, in its view, to find S.S.’s claim wanting.¹⁰⁰

B. The Dissent

The dissent argued that *DeShaney* involved facts sufficiently dissimilar to those *sub judice* so as to render its rationale inapplicable to a proper disposition of S.S.’s claim.¹⁰¹ Arguing that *DeShaney* limited only the “positive liberty” of

92. *McMullen*, 225 F.3d at 963.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 963-64.

97. *Id.* at 964.

98. *Id.* For a recent exposition of this doctrine, see *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

99. *McMullen*, 225 F.3d at 964.

100. *Id.* (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

101. *Id.* (Gibson, J., dissenting).

protection by the state from private danger, the dissent contended that S.S. had stated a claim based on the “negative liberty” of protection from harm *at the hands of the state*.¹⁰² Indeed, because S.S. did not allege that the state had violated a “positive” liberty, the dissent contended that the two recognized exceptions to a state’s non-liability for failure to prevent citizen-on-citizen violence—the “state-created danger” exception and the “special relationship” exception—were not applicable in this case.¹⁰³ While the dissent credited the majority for recognizing the important difference between failure to protect and affirmative acts of endangerment, it argued, nonetheless, that the majority erred in “deciding where to draw the line between action and inaction.”¹⁰⁴ The decision in *DeShaney* is inapposite to this case, the dissent claimed, because Joshua DeShaney attempted to locate a constitutional violation in Wisconsin’s failure to act, while S.S. alleged Missouri’s decision to act was, itself, a constitutional violation.¹⁰⁵

The dissent criticized the majority’s distinction between exposing a child to new dangers and returning her to old ones, and *Murphy*’s distinction between foster parents and natural parents as “arbitrary.”¹⁰⁶ Rather, the dissent stated, the better distinction is “whether the state actors have so intervened in the child’s situation that they can be said to have rescued the child from danger. At that point, the child’s fate is in the state’s hands, whether it decides to entrust him to stranger or kin, to new dangers or old.”¹⁰⁷

The dissent also challenged the majority’s holding that S.S. failed to allege acts sufficiently egregious to establish a violation of her Fourteenth Amendment rights.¹⁰⁸ Noting that the majority conceded “deliberate indifference” sometimes may meet a “shocks the conscience” test,¹⁰⁹ the dissent next stated that this was such a case, given the fact that DFS had time to deliberate in making its decisions

102. *Id.* at 966 (Gibson, J., dissenting). The dissent quoted at length from Judge Posner’s opinion in *Murphy* in support of the distinction between positive and negative liberty claims. *Id.* (Gibson, J., dissenting); see *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990).

103. *McMullen*, 225 F.3d at 966 n.3 (Gibson, J., dissenting).

104. *Id.* at 967 (Gibson, J., dissenting).

105. *Id.* (Gibson, J., dissenting).

106. *Id.* at 968 (Gibson, J., dissenting).

107. *Id.* (Gibson, J., dissenting). The *McMullen* dissent cites *Courier v. Doran*, 23 F. Supp. 2d 1277 (D.N.M. 1998), and *Tazioly v. City of Philadelphia*, No. CIV.A. 97-CV-1219, 1998 WL 633747 (E.D. Pa. Sept. 10, 1998), in support of the argument that whether the state places a rescued child in a foster home or back in a parent’s home is immaterial. See also *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 210 (1989) (Brennan, J., dissenting).

108. *McMullen*, 225 F.3d at 968 (Gibson, J., dissenting).

109. *Id.* at 969 (Gibson, J., dissenting).

vis á vis S.S.¹¹⁰ The dissent did not challenge the appropriateness of the Supreme Court's "shocks the conscience" standard directly; it simply argued that the actions of the DFS employees responsible for S.S. while she was in state custody met the standard.¹¹¹

V. COMMENT

The decision in *McMullen* reflects and perpetuates a longstanding resistance on the part of the federal courts to interpreting the Fourteenth Amendment as imposing affirmative duties upon the states. It is apparent that the majority in *McMullen* felt compelled by *DeShaney* to reject S.S.'s claim.¹¹² It is less obvious, however, that *DeShaney* directly addressed the claim raised by S.S. or—even if the case was on point—that the reasoning in *DeShaney* should be perpetuated at all.

The facts of *DeShaney* and the claim made by the plaintiff in that case are distinguishable from those in *McMullen*. As the *McMullen* dissent noted, Joshua DeShaney never claimed that the State of Wisconsin violated his constitutional rights in returning him to his father.¹¹³ Rather, Joshua claimed that his due process rights were violated when the state did nothing to protect him *after* the state relinquished custody to his father.¹¹⁴ In doing so, Joshua issued a more direct challenge to the Supreme Court's traditional Fourteenth Amendment jurisprudence than did S.S., who claimed not that the state failed to act but rather that the state did act in a harmful manner.¹¹⁵ Also noteworthy is the fact that, while Joshua DeShaney was taken into temporary custody and quickly returned to his father, S.S. was in the permanent custody of the state for more than two years.¹¹⁶ Rather than focusing on the single act of returning S.S. to her father two years after taking full responsibility for her well-being, the court in *McMullen* viewed the entire period of state custody as one state action. In doing so, "the court was able to shift the issue from whether the state harmed S.S., to whether the danger to which

110. *Id.* (Gibson, J., dissenting). In this regard, the dissent applied a discussion in *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998), wherein the Supreme Court distinguished between reckless police chases of fleeing motorists or prison guards responding to a riot on one hand, and the sort of lengthy decisionmaking that occurred in this case on the other. *McMullen*, 225 F.3d at 969 (Gibson, J., dissenting).

111. *Id.* (Gibson, J., dissenting).

112. *Id.* at 963.

113. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989).

114. *Id.*

115. *McMullen*, 225 F.3d at 967 (Gibson, J., dissenting).

116. *Id.* at 963.

she was exposed differed from the reason for her removal, a factor that should not merit constitutional significance."¹¹⁷

Even if it is assumed, *arguendo*, that *DeShaney* speaks directly to S.S.'s claim, it is not at all clear that *DeShaney* represents a rationale worthy of emulation. The *DeShaney* Court's uncritical allegiance to the longstanding federalist concerns previously exhibited by the Court in interpreting the Fourteenth Amendment is troubling. Proponents of the decision have argued that *DeShaney* reflects an adherence to the Constitution's text, that it honors the Framers' intent, that it is appropriately federalist in its perspective, and that it protects against a spate of constitutional tort litigation that would overwhelm the judicial system.¹¹⁸ While these arguments are formidable,¹¹⁹ it remains the case that the Supreme Court, as the final arbiter of constitutional doctrine, is free to imbue the Fourteenth Amendment with the empowering effect originally intended, rather than acquiesce to what the *DeShaney* Court characterized as a foregone and immutable conclusion.¹²⁰ Despite the Court's clear preference for arguments against imposing affirmative duties, fairness seems to demand an acknowledgment that

117. Note, *Constitutional Law—Substantive Due Process—Eighth Circuit Denies Liability for Returning Child in State Custody to Parent Despite Known Potential for Abuse—S.S. v. McMullen*, 114 HARV. L. REV. 1653, 1657 (2001) (citing *Camp v. Gregory*, 67 F.3d 1286, 1294-95 (7th Cir. 1995), *cert. denied*, 517 U.S. 1244 (1996), which rejected the constitutional significance of returning a child to the original dangerous environment as opposed to a new one).

118. See Schriwer, *supra* note 2, at 390-91.

119. See Schriwer, *supra* note 2, at 391 ("The debate becomes an academic exercise in a particularly even-handed game of ping pong.")

120. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 212-13 (1989) (Blackmun, J., dissenting); Gerhardt, *supra* note 39, at 438. Notwithstanding the Court's insistence in *DeShaney* that it is bound to interpret § 1983 claims strictly, [l]ittle more than a month [before *DeShaney*], . . . a unanimous Court acknowledged in a different context that the Ku Klux Klan Act of 1871, the predecessor to the civil rights statute, 42 U.S.C. § 1983, was a remedy "against those who representing a State in some capacity were unable or unwilling to enforce a state law." The "paradigmatic section 1983 claim in 1871," Justice Marshall wrote, "involved a victim of violence or harassment who sued state officials for failing to prevent the harm." It would seem, therefore, that there is nothing in the civil rights statute itself, nor in the fourteenth amendment, which it was designed to enforce, that necessarily bars the cause of action that the *DeShaney* Court refused to recognize.

Laura Oren, *The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C.L. REV. 659, 663-64 (1990) (quoting *Owens v. Okure*, 488 U.S. 235, 250 n.11 (1989) (internal citations omitted)).

“for every argument against finding affirmative governmental duties, there is a matching and equally compelling reason to do so.”¹²¹

Perhaps more disturbing is the failure of the court in *McMullen* to find in the state’s transfer of S.S. to her father’s care the sort of state action that shocks the conscience. Although it is firmly rooted in Supreme Court jurisprudence,¹²² the effect of the “shocks the conscience” standard goes beyond what the Court claims is an attempt to stem the flow of constitutional tort litigation. The unfortunate byproduct of employing the standard to so admirable an end is that it eviscerates the Fourteenth Amendment of any power it otherwise might possess to enable courts to protect citizens from governmental abuse.¹²³ By raising the bar, a plaintiff must clear in order to state a claim under § 1983 to such lofty heights that even reckless indifference to a citizen’s welfare is likely to be insufficient,¹²⁴ the Court has frustrated any real chance of success for the substantive due process claims of some of society’s most vulnerable individuals—abused children. Moreover, the court of appeals in *McMullen*, by mechanically applying an unduly stringent “shocks the conscience” standard to S.S.’s claim, failed to recognize that its analysis was, in the end, a case-specific determination. Rather than look for

121. Schriwer, *supra* note 2, at 391. Regarding the Court’s recent invigoration of federalism and Eleventh Amendment sovereign immunity jurisprudence, see *supra* note 43. Professor Akhil Reed Amar argues persuasively that such a doctrine is “constitutional nonsense” and “quite literally, the precise negation of the Founders’ root idea that the People are sovereign and governments are not. There is no constitutional right for government to violate the Constitution and get away with it, even if sovereign immunity was a traditional concept at the Founding.” Akhil Reed Amar, *The Supreme Court 1999 Term: Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 115 (2000). Amar argues further that:

[c]ases like [*Kimel v. Florida Board of Regents*] . . . fail to check abuses or redress wrongs, instead allowing states to escape liability for their illegal acts. A sounder . . . approach, building on the very Founding sources that the Court has invoked but failed to follow, would use federalism to protect rights, not defeat them. Each government would have reciprocity not in shielding itself when it violates the Constitution, but in empowering citizens to gain full remedies when the other government violates the Constitution. In this view, the federal government should be recognized as having broad power to arm Americans with remedies against states when states violate the Constitution or valid federal laws.

Id. at 116-17.

122. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998); *Rochin v. California*, 342 U.S. 165, 174 (1952).

123. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2313 (1990).

124. See *S.S. ex rel. Jervis v. McMullen*, 225 F.3d 960, 964 (8th Cir. 2000) (en banc), *cert. denied*, 121 S. Ct. 1227 (2001).

factual “similarity between our case and the Supreme Court cases in which a complaint was held to be [conscience shocking],”¹²⁵ the court of appeals might have served S.S.’s constitutional interests better by addressing the facts before it on their own terms and placing less emphasis on inflexible and—arguably—flawed precedent.

The concerns discussed above notwithstanding, the current tenor of Supreme Court jurisprudence makes it unlikely that any broadening of the states’ Fourteenth Amendment liability is forthcoming.¹²⁶ Given the Court’s unwillingness to interpret the Fourteenth Amendment as imposing affirmative duties upon the states and its continued adherence to the prohibitive “shocks the conscience” standard for evaluating substantive due process claims, another avenue of relief is needed. It may be appropriate, for states wishing to afford their constituents the safeguards federal courts are largely unwilling to provide, to follow the suggestion of Chief Justice Rehnquist, which concluded the majority opinion in *DeShaney*:

The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process.¹²⁷

If it is true that the Supreme Court “has repeatedly looked to tort law to explicate 42 U.S.C. § 1983”¹²⁸ due to tort law’s traditional hostility toward legislating moral imperatives to act, then it is perhaps instructive to note that tort law “can no longer be said to follow a strict rule of punishing merely misfeasance as opposed to nonfeasance.”¹²⁹ Given the trend in tort law away from an amoral, individualistic stance on affirmative duties in favor of a scheme that recognizes circumstances where more may be required of a person than inaction or, even,

125. *Id.*

126. *See, e.g.,* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (5-4 decision) (holding that Eleventh Amendment sovereign immunity applied to suits against a state under the Americans with Disabilities Act); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (5-4 decision) (holding that Congress exceeded its authority in purporting to authorize citizen suits against a non-consenting state under the Age Discrimination in Employment Act).

127. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 203 (1989).

128. Theodore Y. Blumoff, *Some Moral Implications of Finding No State Action*, 70 NOTRE DAME L. REV. 95, 102 n.30 (1994).

129. Schriwer, *supra* note 2, at 396; *see also* Blumoff, *supra* note 128, at 103.

negligent good-faith action,¹³⁰ tort law may not afford the “cover” used by the Supreme Court in this area that it once did. The nascent shift toward a tort system that calls for a so-called “duty to rescue” in a non-negligent manner suggests the appropriateness of holding state actors accountable for the gross negligence that led to the injuries suffered by S.S., Joshua DeShaney, and the untold number of other children who are caught in the web of a child welfare system that is overwhelmed and, often, either slow to respond or negligent in its response to the needs of those children it is designed to protect.

It, of course, would be inaccurate and unfair to characterize the task of state child welfare agencies as anything less than herculean. The *McMullen* court correctly noted the sound public policy mandating that children remain with or be returned to their natural parents if to do so is in the best interest of the child.¹³¹ The conflict between this policy and the inherent charge of such agencies to combat the scourge that is child abuse too often presents underpaid, overworked case workers with a Hobson’s choice. It indeed would wreak havoc on a troubled child welfare system to declare open season on its employees—who are already in short supply—by reducing the standard for incurring liability for mistakes in judgment to mere negligence.¹³²

Still, it cannot be satisfying to any observer that the *affirmative acts*, and not merely the *inaction*, of the DFS employees assigned to S.S.’s case appear to merit no more of a sanction under current law than unfavorable dictum in a judicial

130. See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 346-47 (Cal. 1976).

131. The importance of family privacy and autonomy has deep roots in Supreme Court jurisprudence. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 766-69 (1982) (establishing “clear and convincing evidence” as the minimum standard a state must meet to deprive parents of custody of their children); *Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) (invalidating a municipal housing ordinance that purported to define the term “family” for the purpose of limiting household occupancy); *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972) (Amish children are not required to attend school until age sixteen as required by a state statute.); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (state law that prohibited distribution of contraceptives to single persons violated the Fourteenth Amendment’s equal protection clause); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (state law prohibiting the teaching of children in languages other than English invalidated).

132. Foregoing individual social worker liability in favor of state liability unfortunately would be “difficult to accomplish . . . under current Supreme Court doctrine of Section 1983 municipal (government) liability.” Oren, *supra* note 120, at 729; see also *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (finding states not liable as “persons” under § 1983 in state courts); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976) (finding states not liable for money damages under § 1983). But see *City of Canton v. Harris*, 489 U.S. 378 (1989) (finding the city’s failure to train its police force to constitutional standards held actionable under § 1983).

dissent.¹³³ Barring an unforeseen shift in Supreme Court jurisprudence toward a stance more reflective of the spirit of the Fourteenth Amendment, states voluntarily should institute a reform of tort law that would hold the feet of grossly negligent state actors to the same fire that tort law increasingly does in the case of individual rescuers.¹³⁴

VI. CONCLUSION

In *S.S. ex rel. Jervis v. McMullen*, the United States Court of Appeals for the Eighth Circuit applied *DeShaney v. Winnebago County Department of Social Services* to the substantive due process claim of a girl returned to parental custody by the state despite the state's having reason to believe that to do so was to return the child to a dangerous situation. Because the court found the state did not place S.S. in a position of danger that she had not faced before, and because, even if the state did so act, it did not shock the conscience of the court, S.S.'s substantive due process claim was held invalid.

The court's decision brings into stark relief the shortcomings of the Supreme Court's unduly strict "negative liberties" approach to interpreting the Fourteenth Amendment and its practice of applying a prohibitive "shocks the conscience" standard to substantive due process claims. Despite the Court's freedom to adopt a more lenient test of such claims, no move in that direction is readily apparent.

Because the federal courts remain steadfast in their determination not to recognize constitutional torts against children in all but the most heinous scenarios, the situation is ripe for states to initiate tort reform aimed at holding state actors accountable for grossly negligent affirmative acts that place children in any position of apparent danger. To do so would mirror an ongoing and intriguing shift in tort law from a formalistic and amoral stance on individuals' duty to rescue in a non-negligent manner to one that more closely reflects appropriate public policy and common decency.

BRYAN R. BERRY

133. The hyper-insulated position of the individual social worker is all the more troubling when one recalls Justice Brennan's concern in *DeShaney* that the state's "monopolization of a particular path of relief" for abused children further isolates endangered children. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 203, 207 (1989) (Brennan, J., dissenting); see Oren, *supra* note 120, at 703.

134. See *supra* notes 129-30 and accompanying text.

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